NO. 43181-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

FIRST-CITIZENS BANK & TRUST COMPANY, successor in interest to VENTURE BANK,

Plaintiff/Appellant,

v.

BRUCE A. REIKOW and SANDRA J. REIKOW, individually and the marital community comprised thereof,

Defendants/Respondents

BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF THE CASE

This is an appeal from a bench trial of a post-foreclosure deficiency action brought by Plaintiff/Appellant First-Citizens Bank & Trust Company ("FCB") against Defendants/Respondents Bruce A. Reikow and Sandra J. Reikow (the "Reikows"), who were the guarantors of a commercial loan made by FCB's predecessor, Venture Bank, to NBP, LLC, a Washington limited liability company (the "Borrower").

On December 2, 2008, the Borrower executed and delivered to Venture Bank a promissory note (the "Note") for purposes of obtaining a commercial loan in the original principal amount of $6,746,803.53 (the "Loan"). CP at 17, 24-25.

To secure the Note, the Borrower granted a Deed of Trust to Venture Bank dated July 25, 2005 (the "Deed of Trust").[1] CP at 18, 27-35. The Deed of Trust secured the Note against commercial real property owned by the Borrower located in Gig Harbor commonly known as the "Narrows Business Park" (the "Property"). CP at 18, 28. A modified Deed of Trust was recorded on November 29, 2006. CP at 18, 36-38. As additional security for the Loan, Venture Bank required the Reikows and

[1] The Note, dated December 2, 2008, expressly states that it is secured by the previously executed Deed of Trust dated July 25, 2005, as subsequently modified. CP at 25. The Deed of Trust had originally secured a prior note not at issue in this appeal. CP at 25.

Karl R. Zetterberg and Jane Zetterberg to each execute identical personal guaranties, dated July 25, 2005 (the "Guaranties"). CP at 18, 40-51.[2]

On September 11, 2009, Venture Bank was closed by the Washington State Department of Financial Institutions and placed in FDIC receivership. CP at 18. FCB acquired the assets of Venture Bank from the FDIC including the Note, Deed of Trust, and Guaranties. CP at 18-19.

In November 2009, FCB declared the Note in default. CP at 19. FCB instructed the trustee under the Deed of Trust to commence a non-judicial foreclosure of the Property pursuant to Ch. 61.24 RCW. CP at 19. The trustee prepared and recorded a Notice of Trustee's Sale which provided that the Property would be sold at a trustee's sale to be conducted on July 9, 2010. CP at 19.

At the trustee's sale, FCB credit bid the amount of $5,215,000. CP at 19. FCB, the only bidder at the trustee's sale, purchased the Property. CP at 19. As of the date of the trustee's sale, FCB contended that the amount due on the Note was no less than $7,168,710.74. CP at 19. On July 13, 2010, the trustee conveyed the Property to FCB via a trustee's deed that recited the consideration to be its credit bid. CP at 19.

[2] The Zetterbergs are not parties to this appeal. On February 10, 2012, FCB dismissed its claims against the Zetterbergs. CP 216-217.

On October 18, 2010, FCB sued to enforce the Guaranties and sought a deficiency judgment against the Reikows and Zetterbergs. CP at 1-5. In the complaint, FCB stated that the Notice of Trustee's Sale and all required notices were provided to the guarantors (i.e., the Reikows and Zetterbergs) pursuant to RCW 61.24 et seq. CP at 3. FCB prayed that judgment be entered against the Reikows and Zetterbergs in an unspecified amount to be proven at trial representing the outstanding balance due on the Note less the fair value of the Property or the credit bid sum of $5,215,000. CP at 4. The Reikows answered FCB's complaint and requested the court to determine the fair value of the Property sold at the trustee's sale pursuant to RCW 61.24.100(5). CP at 6-8.

In January 2011, Bruce Reikow received in the mail from FCB an IRS Form 1099-A. CP at 149. Federal law requires a foreclosing lender to issue a 1099-A to the borrower for the year in which real property is sold at a foreclosure sale, and to declare the fair market value of the property foreclosed.[3] The purpose behind the 1099-A is, *inter alia*, to enable the borrower to calculate any gain or loss realized from the sale of the property in the year of the sale or cancellation of indebtedness income, and to enable the taxpayer to accurately report income, and/or gain or loss

[3] 26 USC § 6050J(a)(1) and (c); Treas. Reg. §1.6050J-1T. Q/A-26(g). Q/A-32.

to the IRS.[4] FCB declared in the 1099-A the fair market value of the Property to have been $7,820,000 at the time of the trustee's sale. CP at 153. The Reikows relied on the FCB-provided fair market value in preparing and filing their federal tax return. CP at 257.

On August 25, 2011, FCB moved for summary judgment and requested that the trial court enter judgment for a deficiency in the amount of $1,953,710.74. CP at 9-16. The total of this claimed deficiency of $1,953,710.74 plus the bid of $5,215,000 is $7,168,710.74, which is $651,289.26 less than the fair market value that FCB had declared to the IRS. CP at 153. On October 17, 2011, Bruce Reikow filed a declaration in opposition to FCB's motion for summary judgment. CP at 149-173. Mr. Reikow attached to his declaration a copy of the IRS Form 1099-A. CP at 153.

In its reply in support of the motion for summary judgment, FCB contended (1) that the Reikows waived their right to a fair value determination by executing the Guaranties; (2) that there is no such thing as a right to a fair value determination; (3) that the trial court is not required to grant a request for a fair value determination, (4) that

[4] Non-judicial foreclosure sales qualify as recognition events under 26 USC §1001, and the taxpayer is liable for the tax computed on the capital gain realized at the foreclosure sale. *Cox v. C.I.R.*, 68 F.3d 128 (5th Cir., 1995). Additionally, the taxpayer may be subject to cancellation of indebtedness income. 26 USC § 61(a)(12); *U.S. v. Kirby Lumber Co.*, 284 U.S. 1, 52 S.Ct. 4, 76 L.Ed. 131 (1931)

conducting a fair value determination would waste precious and scarce judicial resources and needlessly delay the resolution of the case, and (5) that FCB's bid at the trustee's sale constituted payment of fair value. CP at 174-180.

On January 27, 2012, the trial court granted partial summary judgment to FCB on the Reikows' liability on the Guaranties for the amount owed on the Note as of the date of the Trustee's Sale. CP at 213-214. However, the trial court ruled that there was a genuine issue of material fact concerning the fair value of the Property as of the date of the Trustee's Sale and the court reserved that issue for trial. CP at 214.

On February 21, 2012, the matter was tried to the Court. The Reikows represented themselves. At trial, FCB contended that the fair value of the property was $6,630,000. FCB objected to the admission of the IRS Form 1099-A into evidence on relevance grounds. RP (Feb. 21, 2012) at 6-8. Its objection was overruled. RP (Feb. 21, 2012) at 4-8.

FCB offered testimony from two witnesses: real estate appraiser Reid Erickson and FCB employee Michael Meyer. Mr. Erickson testified about the appraisal his outfit prepared for FCB, expressing his opinion of the value of the Property as of December 16, 2009 – almost 7 months prior to the trustee's sale. The appraisal contained different value opinions: an "as-is" value of $6,630,000, and a "stabilized" value of $7,820,000:

MR. KLEINBERG: Based on your investigation and your knowledge and your experience, did you arrive at an opinion of the fair market value of the property as of December 16, 2009?

MR. ERICKSON: Yes.

MR. KLEINBERG: Okay. And what figure did you arrive at?

MR. ERICKSON: $7,820,000.

MR. KLEINBERG: Okay.

MR. ERICKSON: As of what date? Excuse me.

MR. KLEINBERG: We're looking at the fair market value or as-is value as of December 16, 2009?

MR. ERICKSON: As of 2009, the fair market value was $6,630,000.

RP (Feb. 21, 2012) at 18-19.

Mr. Meyer testified that he had no personal knowledge of who prepared the IRS Form 1099-A, but that it was his opinion that whoever prepared it made a "mistake":

MR. KLEINBERG: Who prepared this form?

MR. MEYER: I don't know an individual. It would have been *someone in our accounting department* in Raleigh.

MR. KLEINBERG: Do you see Box 4 of the form where is says "fair market value," and there's a figure next to it?

MR. MEYER: I do.

MR. KLEINBERG: Okay. That Box 4 contains a figure of $7,820,000 right?

MR. MEYER: That is correct.

. . . .

MR. KLEINBERG: If I heard you right, Mr. Meyer, it is your opinion that the bank made a mistake with respect to the preparation of this form?

MR. MEYER: Yes.

. . . .

CROSS EXAMINATION BY MR. REIKOW: So just this one instance, and it happened to be for me that they picked the wrong number?

MR. MEYER: This is the only 1099 form I've looked at this year.

MR. REIKOW: Okay. So if you're saying this is incorrect as First Citizens, have they ever filed a correction?

MR. MEYER: *I'm not aware of one being filed.*

RP (Feb. 21, 2012) at 48-49, 52-53 *[emphasis added]*.

After considering the evidence and testimony presented at trial, the trial court found the fair value of the Property at the time of the trustee's sale to have been $7,820,000. RP (Feb. 21, 2010) at 80-81. On March 8, 2012, the trial court entered findings of fact and conclusions of law and entered judgment against FCB for the Reikows' attorneys' fees in the amount of $14,653.26. CP 256-260.

II. ARGUMENT

A. A GUARANTOR HAS A STATUTORY RIGHT TO REQUEST A JUDICIAL DETERMINATION OF THE FAIR VALUE OF THE PROPERTY SOLD AT A TRUSTEE'S SALE.

FCB contends that the trial court erred in granting to it only partial summary judgment on the Guaranties and reserving for trial the issue of the fair value of the Property. The appellate court reviews summary judgments de novo and engages in the same inquiry as the trial court, considering all facts in the light most favorable to the nonmoving party. *Herring v. Texaco, Inc*., 161 Wn.2d 189, 165 P.3d 4 (2007).

In any deficiency action against a guarantor following a non-judicial foreclosure of a deed of trust securing a commercial loan, the guarantor has the right to a hearing to establish the fair value of the property. RCW 61.24.100(5) ("This section is in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale"). The Legislature delegated to the "court or other appropriate adjudicator" the discretion to decide the issue of fair value. *Id.* The Legislature granted to the courts this power in order to prevent abuse by commercial banks and lenders of the non-judicial deed of trust foreclosure process. See, e.g. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn. 2d 886, 924-925, 506 P.2d 20, 43

(1973), quoting *Lee v. Barnes*, 61 Wn.2d 581, 379 P.2d 362, 365 (1963) ("'(T)he purpose of fixing an upset price is to assure the mortgagor of a fair price . . .'").

The question of a deficiency arises post-foreclosure after the bank or lender has disposed of the collateral by power of sale, a process which involves no court supervision. The extent of the guarantor's liability for a deficiency (or, as here, whether there is any such liability) depends upon whether fair value was paid for the property at the trustee's sale. The court's power to determine fair value ensures objectivity and fairness by subjecting a commercial bank or lender's post-foreclosure claim for deficiency to judicial scrutiny.

In its complaint, FCB prayed for a deficiency judgment against the Reikows and Zetterbergs "in an amount to be proven at trial, representing the outstanding balance of the Note . . . . *less the fair value of the Property sold at the trustee's sale* or the price paid at the trustee's sale . . . ." CP at 4. Nevertheless, FCB now asks this Court to hold that the trial court should not have determined that which FCB prayed for it to determine.

RCW 61.24.100(5) expressly grants a guarantor the right "following a trustee's sale under a deed of trust securing a commercial loan" to "request the court or other appropriate adjudicator to determine the fair value of the property sold." "Fair value" is defined as "the value

of the property encumbered by a deed of trust that is sold pursuant to a trustee's sale." RCW 61.24.005(6). That statutory definition goes on to provide:

> This value *shall be determined by the court* or other appropriate adjudicator by reference to the most probable price, as of the date of the trustee's sale, which would be paid in cash or other immediately available funds, after deduction of prior liens and encumbrances with interest to the date of the trustee's sale, for which the property would sell on such date after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress.

Id. [emphasis added].

The Reikows had a statutory right to request that the court exercise its power to determine the fair value of the Property at the foreclosure.

B. FCB IS ESTOPPED FROM ARGUING THAT THE REIKOWS HAVE NO RIGHT TO A FAIR VALUE HEARING.

Equitable estoppel requires proof of (1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act. *Lauer v. Pierce County*, 173 Wn. 2d 242, 257, 267 P.3d 988, 994 (2011).

It is a condition precedent to pursuing a deficiency judgment against a guarantor that the guarantor is served with the notice required by RCW 61.24.042. RCW 61.24.100(3)(c); *see also*, 27 Wash. Prac., *Creditors' Remedies – Debtors' Relief* § 3.43.5. RCW 61.24.042 provides as follows:

> The beneficiary may give the notices of default, trustee's sale, and foreclosure . . . to any one or more of the guarantors of a commercial loan at the time they are given to the grantor. *In addition to the information contained in the notices provided to the grantor, these notices shall state that (1) the guarantor may be liable for a deficiency judgment*; . . . and (5) *in any action for a deficiency, the guarantor will have the right to establish the fair value of the property* as of the date of the trustee's sale, . . . and to limit its liability for a deficiency to the difference between the debt and the greater of such fair value or the sale price paid at the trustee's sale, plus interest and costs.

RCW 61.24.042 *[emphasis added]*.

FCB expressly represented in its complaint that it provided to the Reikows all notices required by RCW 61.24 et seq. CP at 3 and 19. In its motion for summary judgment, FCB argued that the court should enter a deficiency judgment because the guarantors had been "timely and properly" noticed under RCW 61.24.042, including notice of their right to establish the fair value of the property. CP at 13-14.

FCB has since taken the inequitable, inconsistent position that the Reikows were not entitled to exercise that right. FCB was required to

provide to the Reikows the 1099-A for them to report realized gain or loss and/or cancellation of indebtedness income from the foreclosure on their federal tax return. The 1099-A reported the fair market value of the Property to have been $7,820,000. The Reikows relied on that valuation in preparing and filing their federal tax return. CP at 257. Their reliance is required by federal law and thus inherently reasonable. FCB is estopped from arguing that the Reikows have no right to have the court determine the fair value of the Property when it claims a value different than that which it provided to the Reikows.

C. THE REIKOWS DID NOT WAIVE THEIR RIGHT TO A FAIR VALUE HEARING.

Commercial guaranties are to be strictly construed according to their terms. *Seattle-First Nat'l Bank v. Hawk*, 17 Wn. App. 251, 256, 562 P.2d 260 (1977). Guaranty agreement language "should receive a fair and reasonable interpretation reflecting the purpose of the agreement and *the right of the guarantor to not have his obligation enlarged.*" *Old Nat'l Bank of Wash v. Seattle Smashers Corp.*, 36 Wn. App. 688, 691, 676 P.2d 1034 (1984) *[emphasis added]*. The courts should not read into a commercial guaranty terms and conditions on which it is completely silent. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn. 2d 886, 919, 506 P.2d 20, 40 (1973).

Waiver is the intentional abandonment or relinquishment of a known right. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). "[Waiver] must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive." *Mid-Town Ltd. P'ship v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, 1272 (1993). A guarantor's waiver in a guaranty agreement must be set forth in clear and unambiguous terms. See, *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 409 P.2d 651, 654 (1966). Citing *Freuhauf*, Division II of the Court of Appeals extended to guarantors the UCC's public policy requiring lenders to realize against collateral for a loan in a commercially reasonably manner, and held that those protections may not be waived. *Security State Bank v. Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000). Here, the right to notice and determination of fair value is explicitly given to both the debtor *and the guarantor* by RCW 61.24.042, RCW 61.24.005(6), and RCW 61.24.100(3)(c) and (5). To the extent that waiver of the Reikows' statutory right to a fair value hearing is even possible, public policy requires that any waiver of that right must be made intentionally, clearly, knowingly and unequivocally.

FCB contends that the Reikows waived the right to a fair value determination because the Guaranties provide for the waiver of any "one action" or "anti-deficiency" law, and any defenses at law or in equity, relying heavily on the Oklahoma Supreme Court's decision in *JP Morgan Chase Bank, N.A. v. Specialty Restaurants, Inc.*, 243 P.3d 8 (Okla. 2010), a ruling for which Respondents were unable to locate any citation by the courts of this state. The *JP Morgan Chase Bank* case is distinguishable because one of the guaranties at issue explicitly stated that the guarantor was waiving the benefits of specific, explicitly referenced statutory provisions regarding a right to setoff. *JP Morgan Chase Bank*, 243 P.3d at 14. The Guaranties signed by the Reikows contain no reference to RCW 61.24.100(5) and speak only in general, boilerplate terms.

Notwithstanding, FCB asks this Court to retreat from public policy considerations afforded to guarantors in Washington, including those protections established by our Supreme Court and this Court in *Fruehauf*, and *Security State Bank v. Burk*, supra. "[U]nder Oklahoma law, guaranty agreements are construed most strongly against the guarantor." *Id.* at 13, (compare with *Security State Bank v Burk*, 100 Wn. App. 94, 995 P.2d 1272 (2000)).

JP Morgan Chase Bank is not consistent with our state's strict construction principles, it is contrary to our state's public policy as

enunciated by Washington courts, and it is inconsistent with a fair reading of the subject Guaranties. Without clear language in the Guaranties expressing the intent to waive the fair value determination set forth at RCW 61.24.100(5), it is impossible for the Reikows to have clearly, unequivocally and intentionally relinquished a known right. Indeed, FCB offered no evidence at trial of the circumstances surrounding the execution of the Guaranties, neither did the bank attempt to offer evidence that the Reikows knew of their right to a fair value hearing at the time FCB contends that they waived it.[5]

The Guaranties were prepared by Venture Bank, FCB's predecessor. Venture Bank elected not to include language in the Guaranties expressly waiving the right to a fair value hearing in RCW 61.24.100(5). The plain language of the Guaranties does not reveal an intention by the Reikows to waive their right to a fair value hearing. There is no evidence in the record that the Reikows intended to waive the fair value hearing, that Venture Bank intended that they do so, or even that the Reikows knew that they had that right. Had Venture Bank intended to

[5] At page 20 of its brief, FCB claims that commercial credit will become "costly and difficult to obtain" if loan documents are not construed according to their "actual and specific terms." There is an utter lack of evidentiary support for this dubious proposition. Moreover, the argument is fallacious, as one of the questions before this Court is whether the boilerplate waiver is, *a priori*, "actual and specific."

require the Reikows to waive their rights under RCW 61.24.100(5), it could have said as much.[6]

FCB's argument that a guarantor can abandon his or her statutory right to a fair value hearing without unequivocally expressing an intent to do so in boilerplace language in the guaranty is antithetical to Washington's public policy and its strict construction principles required for guaranties, as well as a fair and reasonable reading of the Guaranties.

D. IT IS AGAINST PUBLIC POLICY TO ENFORCE A CONTRACTUAL WAIVER OF A GUARANTOR'S RIGHT TO A FAIR VALUE HEARING.

The Legislature added "fair value" to the non-judicial deed of trust foreclosure scheme in 1998. See, 27 Wash. Prac., *Creditor's Remedies – Debtors' Relief* § 3.35 (2011) ("Note that the term defined is "fair value" not "fair market value" and therefore cannot be assumed to have the same meaning."). No case law exists interpreting this section; however the "upset price" provisions in judicial foreclosures, RCW 61.12.060, provides unequivocal guidance in effectively identical circumstances. Both statutory foreclosure schemes require the court to determine "fair

[6] Venture Bank presumably would have included in the Guaranties language in which the guarantor waived the bank's obligation to provide the notices required by RCW 61.24.042 if it intended to effect a waiver of the fair value hearing. Venture Bank did not include language in which the guarantor waived the requirement that Venture Bank provide the notice of entitlement to the fair value hearing. It is therefore reasonable to conclude Venture Bank did not intend that the guarantors waive their entitlement to the fair value hearing.

value." The Legislature analogized the fair value hearing in nonjudicial foreclosures with the upset price hearing in judicial foreclosures in RCW 61.24.100(5), which provides that the guarantor's right to establish fair value "is in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale." RCW 61.24.100(5).

Whether setting an upset price before or after a judicial foreclosure or determining the fair value of property following a non-judicial foreclosure, the court is to consider economic conditions and market conditions requisite to a fair sale. RCW 61.12.060 and RCW 61.24.005(6). The public policy behind both statutes is identical – to prevent the creditor from receiving a windfall due to the lack of competitive bidding:

> In normal times competitive bidding is the circumstance that furnishes reasonable protection to the mortgagor, and avoids the sacrifice of the property at a grossly inadequate sale price. In the present situation the device of a judicial sale largely fails of its intended purposes because of the lack of competitive bidding.

Lee v. Barnes, 61 Wn.2d 581, 585, 379, P.2d 362, 364 (1963); quoting *Suring State Bank v. Giese*, 210 Wis. 489, 246 N.W. 556 (1933).

> The same reasoning applies with equal force to a situation such as that created by present market conditions in which there is no prospect of bidders ready and willing to offer an adequate price, *other than the owner of the mortgage debt*,

> who should not be permitted to take an unconscionable advantage of his position.

Id. at 586 *[emphasis added]*.

The *Lee* Court listed those factors that may be considered by a court in setting an upset price before foreclosure, or determining fair value when confirming a sale after foreclosure. The Court is to "assume the position of a competitive bidder determining a fair bid at the time of the sale under normal conditions." *Id.* In the same way, the court, in determining the fair value of the property following a non-judicial foreclosure, is to determine the most probable price the property would sell for as of the date of the trustee's sale *after reasonable exposure in the market under conditions requisite to a fair sale*, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under duress. RCW 61.24.005(6) *[emphasis added]*. According to the *Lee* court, the factors to be considered in determining a fair value are: (1) the usefulness of the property under normal conditions; (2) the potential or future value of the property; (3) the type of property involved; (4) the potential future economy; and (5) any other factor that bidder might consider in determining a fair bid for the mortgaged property. *Id.* at 586-587.

The policy behind RCW 61.12.060 was derived from the reasoning of the Wisconsin Supreme Court in *Suring State Bank v. Giese*, 210 Wis. 489, 246 N.W. 556 (1933), and was adopted by the Legislature during the Great Depression. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 925, 506 P.2d 20, 43 (1973); see also *Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey*, 107 Wn. 2d 181, 188, 728 P.2d 155, 160 (1986).

The Court can take judicial notice that the current economic recession has devastated the real estate market, that property values have plummeted, that failed loans and foreclosures have exponentially increased, and that real estate market conditions have been unstable.[7] If a guarantor were unable to petition the court to determine the fair value of the property post-foreclosure, he would have no protection from the adverse consequences that the Great Recession has had on property values, and would be powerless to stop a lender from obtaining both the

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[7] The statements of FCB's appraisers regarding the state of the economy and real estate market and its effect on the value of the Property recognize these conditions:

> It should be noted that recent events indicate a rapid and profound shift in the condition of the financial environment and the economy on local, national, and global levels. The extent to which these events impact the subject's value or market period remains unclear . . . . Given current volatility and pace of change, the client is advised to exercise caution in interpreting this appraisal, and especially against assumptions that current values will trend forward smoothly.

CP at 208, and Exhibit 1, pg. 4.

property in foreclosure – where there are no other bidders – and an inequitably high and unfair windfall deficiency judgment. That is precisely the set of economic circumstances that were present in the country when the upset price provisions of RCW 61.12.060 were enacted by the Legislature.

FCB was the only bidder at the trustee's sale for the Property conducted on July 9, 2010. FCB's credit bid of $5,215,000 at the trustee's sale was $1,155,000 less than its own "as-is" value and $2,605,000 less than the "stabilized" value; both of which were determined as of December 16, 2009, not as of the date of the sale. CP at 203-209; Exhibit 1. RCW 61.24.005(6) (requires that "[Fair] value shall be determined by the court or other appropriate adjudicator by reference to the most probable price, *as of the date of the trustee's sale* . . . ."). FCB filed and mailed to the Reikows an IRS Form 1099-A declaring that the fair market value of the Property as of the date of the trustee's sale was $7,820,000. If that amount was a "mistake" as Mr. Meyer speculated without foundation for personal knowledge, there is no evidence that an amended 1099-A was prepared, filed, or provided to the Reikows – despite the fact that FCB made the original "mistake" over a year before trial.[8]

[8] Mr. Meyer demonstrated at trial that he lacked personal knowledge about the preparation of the Form 1099-A. FCB failed to establish at trial that a "mistake" (e.g., a scrivener's error rather than a "mistake" in the sense of a prior inconsistent

As the owner of the debt secured by the Deed of Trust in a weak real estate market FCB, a big, out-of-state bank, had a distinct advantage in bidding on the Property at the trustee's sale. With no competitors vying for the Property, FCB was able to lowball its credit bid. The buyer and seller were effectively the same: the bank. The bank acted in its own self-interest on both sides of the transaction. The foreclosure sale did not reflect competing interests "of buyer and seller each acting prudently, knowledgeably, and for self-interest." the showing required at the fair value hearing. RCW 61.24.005(6). The Reikows' only protection was and is the statutorily provided "fair value" right given to guarantors.

The right to a fair value determination was created by the Legislature to level the playing field. It was created as a matter of public policy to prevent big commercial banks, like FCB, from taking advantage of their position at a distressed sale in a depressed economy where there is little or no competitive bidding. The Legislature has given the courts the power to evaluate whether fair value was bid, and with such power a corresponding duty to assure that people who guarantee loans in a

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position/admission against interest) occurred. FCB took no action to correct the "mistake" prior to trial. Nevertheless, FCB felt it necessary to allege before this Court, at *footnote 6, page 14* of its brief, that Form 1099-A was amended "post-trial." FCB has not sought the admission of additional evidence pursuant to RAP 9.11. There is no evidence before this Court that the IRS Form 1099-A was amended post-trial. The Bank's assertion violates RAP 9.11 and provides a basis for the Court to sanction it pursuant to RAP 18.9

booming economy are treated fairly and equitably when the crash comes. Public policy does not support the contractual waiver of a guarantor's right to a fair value determination; particularly where the Legislature has already proclaimed the guarantor's right to a determination of fair value – in both judicial and non-judicial foreclosures – and has provided courts with the power to fix that fair value as a credit against the loan balance in order to determine the amount of a deficiency judgment "in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale." RCW 61.24.100(5).

E. WAIVER OF THE RIGHT TO A FAIR VALUE HEARING WOULD CREATE INCONSISTENCY IN WASHINGTON PUBLIC POLICY.

The Washington Supreme Court has held that the requirement of a statute enacted for the public good may not be nullified or varied by contract. *Shoreline Comm. College Dist. #7 v. Employment Sec. Dept.*, 120 Wn.2d 394, 409-410, 842 P.2d 938 (1992) (unemployment benefits); See, e.g. *Phillips v. Blaser*, 13 Wn.2d 439, 445, 125 P.2d 291 (1942) (redemption rights). Mortgage foreclosure statutes, judicial and non-judicial, establish the public policy of Washington. *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812 (1977).

This Court has held that a guarantor's right to challenge the commercial reasonableness of a secured creditor's disposition of collateral

may not be waived as a matter of public policy, notwithstanding language in the guaranty agreement waiving "any right to claim discharge of the indebtedness on the basis of unjustified impairment of any collateral for the indebtedness" and "any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness." *Security State Bank v. Burk*, 100 Wn. App. 94, 95-96, 995 P.2d 1272 (2000). This public policy protects the interests of debtors, including guarantors. *Id* at 100.

Security State Bank concerns UCC Article 9. The holding is equally applicable here because the public policy implications are the same; e.g., preventing commercial banks and lenders from taking unfair advantage of individual debtors. *Security State Bank v. Burk*, supra, at 99.

The waiver at issue in *Fruehauf* is distinguishable factually, because it contained an explicit waiver of stated rights, and legally because it did not purport to waive statutory rights designed by the Legislature to protect against overreaching by commercial lenders, which is at issue here. In fact, the appellate court in *Security State Bank* distinguished *Fruehauf* on the second of those grounds. See, *Security State Bank*, 100 Wn. App. 94 at 98 ("But Fruehauf is substantively distinguishable because it did not implicate Article 9 of the U.C.C. This case does."). The Reikows did not clearly and unequivocally demonstrate

an intention to relinquish their fair value rights. This Court should follow the reasoning of *Security State Bank* and reject general waiver language as a means to eliminate a guarantor's rights under RCW 61.24.100(5).

F. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE FAIR VALUE OF THE PROPERTY.

The determination of the fair value of the Property is within the sound discretion of the trial court. RCW 61.24.100(5). When a decision is discretionary, the appellate courts will give considerable deference to that decision and will reverse only for an abuse of that discretion. *In re Jannot*, 110 Wn. App. 16, 20, 37 P.3d 1265 (Div. III, 2002). The proper standard is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion. *Coggle v. Snow*, 56 Wn. App. 499, 506-07, 784 P.2d 554, 559 (1990), quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), which held "Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Courts have discretion to set an "upset price" in a judicial foreclosure action, and to determine the fair value of the property after a non-judicial proceeding. See, RCW 61.12.060, and RCW 61.24.100(5).

The decision to fix an upset price, and the price itself, are matters within the court's sound discretion. *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 204, 813 P.2d 619, 624 (1991); citing *American Fed. Sav. & Loan Ass'n v. McCaffrey*, 107 Wn.2d 181, 188-89, 728 P.2d 155 (1986), and *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d at 926-27, 506 P.2d 20, 43-44 (1973). The court may properly receive any relevant evidence, whether opinion or of direct facts, which might affect the amount of such a bid. *Nat'l Bank of Washington v. Equity Investors*, at 926. This Court should hold that the trial court has the same broad discretion to determine the fair value of property under RCW 61.24 that it has in setting an upset price under RCW 61.12.

At the trial of this case, the court was presented with several values for the Property, including the appraised "as-is" value of $6,630,000 as of December 16, 2009, the appraised stabilized value of $7,820,000 as of that same date, and the fair market value on the date of the foreclosure sale of $7,820,000 provided by FCB in the IRS Form 1099-A. FCB had the burden of proof. After considering the evidence and testimony at trial and the various values presented, the trial court determined that the fair value of the Property was $7,820,000. In making this determination the trial court was troubled by the inconsistent information coming from FCB. RP at 77-81. The trial court rejected the "as-is" value offered by FCB because

it excluded market conditions and represented a deflated price point or duress sale figure and therefore was inconsistent with fair value as defined under the statute. *Id.* at 79. The trial court found the IRS Form 1099-A to be the most compelling evidence presented on fair value. The trial court noted that the Property was acquired on July 9, 2010 and the fair market value at that time was $7,820,000. *Id.* at 80. The Form 1099-A was submitted by FCB to the IRS. *Id.* FCB took no action to revise or amend the Form 1099-A prior to trial. *Id.* It was reasonable for the trial court to determine that the fair value of the Property was $7,820,000. The trial court properly exercised its discretion.

G. THE REIKOWS ARE ENTITLED TO RECOVER ATTORNEYS' FEES AND COSTS ON APPEAL.

Washington follows the American rule that attorney fees are recoverable only when authorized by statute, contract, or equity. *Dayton v. Farmers Ins. Group.* 124 Wn.2d 277, 280, 876 P.2d 896 (1994). RCW 4.84.330 authorizes the award of attorney's fees where a contract specifically provides that attorney's fees shall be awarded to one of the parties. Unilateral attorney fees provisions are to be applied bilaterally. *Herzog Aluminum, Inc v. General Am. Window Corp.*, 39 Wn.App. 188, 196-97, 692 P.2d 867 (1984). Attorneys' fees and expenses incurred on appeal can be awarded if applicable law, contract, or equity permits an

award of such fees and expenses. RAP 18.1(a). The Guaranties contain a unilateral attorney fee provision which provides in relevant part:

> Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty . . . . Costs and expenses include Lender's attorneys' fees and legal expenses . . . . including attorneys' fees and legal expenses for . . . . appeals . . . .

CP at 40-45.

The Reikows were the prevailing party below. The trial court awarded judgment in favor of the Reikows against FCB for the Reikows' attorneys' fees and costs pursuant to the attorney fee provision in the Guaranties. The Reikows are entitled to an award of attorney's fees and costs in this appeal. *Richter v. Trimberger*, 50 Wn. App. 780, 786, 750 P.2d 1279, 1282 (1988).

III. CONCLUSION

This Court should affirm the trial court's fair value determination, affirm the judgment of dismissal and the judgment for attorneys' fees entered in favor of the Reikows against FCB, and award judgment to the Reikows for their attorneys' fees on appeal.

RESPECTFULLY SUBMITTED this 13TH day of August, 2012.

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CERTIFICATE OF SERVICE

I certify that on the 13th day of August, 2012. I caused a true and correct copy of the Brief of Respondents to be served on the following by hand delivery to the following:

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Dated this 13th day of August, 2012.

Kara K. Hanson